Supreme Court, U.S.
FILED

No. 10-120

JUL 1 - 2010
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

James D. Schneller,

Petitioner

v.

Fox Subacute at Clara Burke, Gary Drizin M.D., Debbie McCoy R.N., Marjorie Zitomer, G. Richard Schneller, T. Sergeant Pepper Esquire, Hepburn, Willcox, Hamilton, Putnam L.L.P., Pennsylvania Department Of Aging, Pennsylvania Department of Health, Division of Nursing Care Facilities - Norristown Field Office, Gary Layman, Judith Folan, Samuel J. Trueblood Esquire, Trueblood & Amacher L.L.P.,

Respondents

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether time to file the notice of appeal was tolled by filing of a motion for leave to reply to responses to motion for amendment or reconsideration of a concluding order, and a motion for sanctions for false pleading in the proceeding culminating in pleadings responsive to the motion for amendment or reconsideration.

B. Resolution of errors of law, and reversal, are requested, of a Circuit Court's affirming of denial of an urgent motion to reply to responses to a motion for amendment or reconsideration of a concluding order, and affirming of denial of a motion for sanctions for false pleading in the proceedings culminating at the time of the motion for amendment or reconsideration.

C. Whether a trust estate beneficiary, trustee ad litem, co-contractee, and additionally qualified offspring of a deceased may litigate torts on behalf of the deceased, that were experienced together with the deceased, pursuant to existing authorities, which do not delineate the specific circumstances present in this case.

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To the Justices of the Supreme Court:

Petitioner James D. Schneller, representing himself, on behalf of all plaintiffs and the issues affecting them, requests a writ of certiorari to the Third Circuit Court of Appeals, and relief in the alternative, stating as follows :

I. JURISDICTION

This petition is taken from a decision of a United States Circuit Court of Appeals. The date on which the United States Third Circuit Court of Appeals decided this case was March 8, 2010. The order denying rehearing of the decision was entered on April 2, 2010.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Petitioner has raised his objections and arguments in regard to the issues presented in this petition, in the proceedings below. Petitioner

raised all issues including the within questions, in the pleadings which he presented to the trial Court, making certain to preserve any issues, due to lack of hearing and failure of the defendants to address many of the issues in plaintiff's pleadings. Each issue in these proceedings was responded to by respondents or was afforded an opportunity for response by respondents.

II. OPINIONS BELOW

The United States Court of Appeals for the Third Circuit decided this case in an order, dated March 8, 2010. (App. - p.36) The District Court for Eastern Pennsylvania decided this case in an memorandum and order entered June 26, 2009. (App. - p.49)

III. STATEMENT OF THE CASE

Son-caregiver, plaintiff ("petitioner"), wrongful death beneficiaries, and the estates of the deceased, filed a 24 count complaint alleging deprivals, and conspiracies to deprive, civil rights, violations of

Assisted Suicide Funding Restriction Act and other statutes, intentional torts, and wrongful death, with motion for leave to proceed in forma pauperis. The motion for leave to proceed in forma pauperis was denied in a memorandum and order dismissing the case for lack of federal question jurisdiction. Plaintiff appealed and the Third Circuit dismissed the appeal pursuant to 28 U.S.C. §1915(e)(2)(b). Plaintiff re-filed the complaint with the filing fee. The district court ordered the case dismissed with prejudice. The Third Circuit reversed and remanded for further action. Motions to dismiss were filed by the defendants for lack of jurisdiction, absence of private right(s) of action, and the statute of limitations. The order granting the motions to dismiss ("concluding Order"), was entered on June 26, 2009. Plaintiffs filed a motion for amendment and reconsideration on July 10, 2009, and then, claiming surprise, and overt falsity by the defendants, filed, five days after denial of reconsideration, a motion to supplement the record (8/11/09), attaching a proposed reply to responses to the motion for reconsideration, and filed a motion for sanction and for costs (9/1/09) pursuant to 28 USC §1927 and F.R.C.P. 11, claiming that false and misleading claims in said responses, mirrored similar error, in volume, in all of the pleadings, so that sanction, as well as reconsideration (requesting thus an additional

"reconsideration" or opening of judgment, for further deliberation) were amply warranted, in the interests of fairness and full adjudication, especially in light of the express error claimed to exist in the concluding decisions appealed from.

The District Court denied the motion to supplement the record and motion for sanction in orders entered on September 9, 2009. Petitioner filed a motion for leave to appeal in forma pauperis on October 9, 2009. Petitioner filed the notice of appeal in this appeal on November 10, 2009, which was fourteen days after entry of the District Court order granting leave to appeal in forma pauperis filed on October 27, 2009.

The Third Circuit clerk and Legal Division forwarded the appeal to the Circuit Court for a determination as to whether jurisdiction was proper, and plaintiffs filed a statement in support of jurisdiction claiming reasons that are generally stated in this petition. A panel entered an order on March 8, 2010, dismissing the appeal from the concluding order for lack of jurisdiction and affirming the denial of the motion to supplement the record and motion for sanctions. Petitioner filed a motion pursuant to F.R.A.P. 35 and F.R.A.P. 40, for rehearing en banc and requesting also, due to extraordinary circumstances constituting good cause, leave to file appeal out of

time pursuant to F.R.A.P. 4 (A)(5). The motion was denied in an Order docketed at April 2, 2010.

IV. MOTION FOR CONSOLIDATION AND FOR DEFERRAL

Petitioner requests consolidation and deferral of argument pursuant to Supreme Court Rules 13.5, 15.3, 25.4, and 30.4, and F.R.A.P. 3(b)(2), F.R.A.P. 28(i), and F.R.A.P. 26 (b).

Each legal issue raised in this petition is also at issue in petitioner's anticipated petition for writ of certiorari from a decision by the Third Circuit in appeal 09-4372 (Schneller v. Prospect Park Nursing and Rehabilitation Center) which in order to be timely, must be filed with the clerk by July 11, 2010.

Petitioner requests consolidation of the cases.

Petitioner requests leave to more fully argue, or to embellish, the within legal discussions, in the anticipated petition, and therefore respectfully incorporates the anticipated petition as if set forth herein.

V. REASONS WHY CERTIORARI SHOULD BE GRANTED

The Third Circuit has decided in an overtly erroneous manner. The panel decisions are contrary to decisions of other panels of the United States Court of Appeals for the Third Circuit and this Court. This dismissal/affirmance, and the underlying appeal deprived of a full review, involve questions of public and legal importance.

A. Whether time to file the notice of appeal was tolled by filing of a motion for leave to reply to responses to motion for amendment or reconsideration of a concluding order, and a motion for sanctions for false pleading in the proceeding culminating in pleadings responsive to the motion for amendment or reconsideration.

In the jurisdictional aspect, the Third Circuit has dismissed in a decision denying any tolling of the time for appeal or accrual of time for appeal at a later point in time, by way of motions seeking

findings of overt falsity in pleadings filed both before and after the order designated as final order, including responses to a motion for rehearing, amendment, or reconsideration, that was denied quickly in a surprise to plaintiff.

The Third Circuit decides in conflict with basic principles of fairness and justness, as abundantly propounded in the published law, by disallowing the claim for tolling, i.e. finality being present only upon the deciding of all pending motions, because the claim is well-founded, and deals with the most abhorrent of acts : perjury. Perjury in fact is not a reason as of course for filing of civil cases, nor for filing new cases or collateral attacks, so plaintiffs had a clear right to urgently raise it in the body of the entire subject matter, as they diligently attempted. Remand for evidence was warranted.

Plaintiffs have claimed that the final orders entered, under the circumstances, are the orders denying the motion for sanction and the motion to supplement the record, pursuant to claims including that new evidence of outright falsity in the pleadings, as well as the absence of any "with prejudice" in the order claimed to dismiss, along with the "merger rule," which provides that interlocutory orders issued before a final judgment are reviewable at the same time as the final

judgment. Plaintiffs also alternatively requested the Third Circuit for ex post facto extension of time to file notice of appeal.

Plaintiffs named all three orders in their notice of appeal. Plaintiffs during this time would be justified in filing a motion to file an amended complaint, but didn't, because it was clear that the District Court was very likely to be adamant about the closed aspect of the case, and had acted so at similar prior instances, and resources are low.

Plaintiffs, noting the falseness in responses to the motion "for amendment and reconsideration," first filed the motion to supplement, in which, pleading surprise at the rapidity of action on motions for amendment, rehearing, or vacating, they raised among all the fact that pleadings in this case contained "substantial unfounded and/or inordinate claims and argument" by defendants. Plaintiffs' proposed reply, attached thereto, then addressed this issue and raised written demands served on defendants by plaintiffs, demanding correction of falsity in their pleadings.

Plaintiffs, as is required in state law, waited 28 days for a response to their demands for amendment or retraction of the pleadings. This is why there was a delay between the motion to supplement the record, and the motion to sanction. Prior to Court action, plaintiffs filed the motions

for sanction, raising defendants' false claims and false conclusions of law.

The Third Circuit was requested to find for plaintiffs' claim that there was a continuum between the post-decision pleadings that warranted a deciding together, which they in fact were, and moreso, that the District Court decided the motions for amendment or vacating, prior to the fair and usual amount of time, that being the 20 days permitted to parties to request leave to amend a pleading. This caused the motion to supplement, and subsequent motion to sanction (which was filed within 30 days of the motions to supplement) to be timely and diligent.

The facts of record exhibit clearly an intent by plaintiffs to initiate, for the District Court's adjudication, a proceeding on vacating or amending, based on a claim of substantial falsity in the pleadings. This is a proceeding on new evidence and plaintiffs had a right to raise it in a post-judgment proceeding under the Rules. The motion for sanction was a means to this end which specified specific instances and caused a prima facie evidence before the trial Court as well as placing much of the burden on the defendants. Besides constituting new evidence, the matter was also, involving perjury and refusal to discover in the underlying proceeding, extraordinary in it's

unlawfulness, and egregiously disrespecting to the Courts and the parties.

A Court has the power to revisit prior decisions of it's own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting Arizona v. California, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). In other words, the law of the case doctrine does not limit a federal court's power, rather it directs its exercise of discretion. Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116 (3d Cir.1997).

Plaintiffs might have sought sanctions earlier in the proceedings, but, besides being numbed by a continuous leveling of exaggeration and falsity at them, there is little support for any claim that a motion for sanctions would have been granted, or would have deterred additional falsity. Defendants have enjoyed such results in motions for sanction in the state court action and have then proceeded to continue their malfeasance right through subsequent appeals. Plaintiffs, however, seeing the

same bald malfeasance appear during a reconsideration action, thought it advisable to prosecute this claim at once while the case remained in the trial Court. Plaintiffs believe that the falsity of the defendants was apparent to the trial Court during the proceedings.

Plaintiffs claim additional conflict with law and misapprehension of fact, because Rule 4 states, in regard to post-trial motions, that "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:" F.R.A.P. 4 Plaintiffs validly filed a post-trial motion and it's related co-motions and thus appeal was most properly and efficiently filed from the last-decided motion. The Third Circuit has affirmed too swordlike a decision, so that both Courts discount well-known principles of finality, efficiency and fairness. There is no law that dictates that an Order once final cannot become a step in the progression to a new final order.

Petitioner can find no decision negativing to plaintiffs' claim that an order appealed from may subsequently become secondary to a new final order or orders, due to a cases' specific circumstances. There is no rule against a party working within the procedural confines in order to bring out a new aspect of the case, especially a newly discovered or newly heightened one.

Dismissal of Complaint and Denial of Rehearing Has Been Upheld or Allowed to Improperly Affect The Issue of Tolling

Of note, the motion in the District Court for rehearing, vacating, or reconsideration has been found to be insufficient by the Third Circuit. Exercise of this Court's authority is requested because the Third Circuit has woven into the decision depriving jurisdiction, an express finding that reconsideration was not warranted regardless of whether jurisdiction was found, and this carries with it an inference that appeal, likewise, would not have been successful. This despite the fact that forma pauperis was granted for appeal. This is an egregious decision. Numerous points of law have been misapprehended and misapplied by the Circuit Court, and conflict has occurred with numerous decisions of this Court and the and other panels of the Third Circuit and other Circuit Courts of the United States. This error is readily observable by way of a concise counter-statement to the District Court and Third Circuit opinions, as follows:

Plaintiffs had raised numerous severe errors in factual findings, also including the disallowance of sworn testimony despite requests and

defendants' abandonment of their responsibility to serve or participate in discovery.

Petitioner's proposals to withdraw the claims against non-diverse parties were not addressed by the trial Court, as if to preclude the eventuality.

Affirming has occurred despite the fact that the statute of limitations objections are addressed by the trial Court only where advantageous to the defendants. For example it is found that contract claims are subject to a 4 year limitation of time yet the law provides a 4 years and a 6 years limitation. The affirming fails to find for tolling of nearly all Counts by way of the complaint's being initially filed in 2006, and fails to adjudicate nor find for the period of time before plaintiff actually became aware of claims, such as the use of government funds for an assisted suicide.

The complaint requests declaratory judgment and injunction yet the ignoring of these by the trial Court is apparently affirmed.

Both Court's findings are incorrect at numerous instances. For example the listing of Counts in the opinion omits mention that Count 24 requests declaratory judgement. The Third Circuit fails to even apprehend that the motion for amendment or reconsideration urgently requested hearing because hearing was refused on matters

including the discovery rule and equitable estoppel. The trial Court completely avoided the claims of intentional acts, which are the greater portion of the allegations and counts.

Some parties did not even answer the complaint.

Plaintiffs validly argued non-authority of the Eleventh Amendment because the agency is more akin to a local agency than a State agency.

The decisions avoided plaintiffs' obviously correct claim that actions under 42 U.S.C. § 1985 (2) , 42 U.S.C. § 1985 (3) and 42 U.S.C. § 1986 carry with them no requirement for state actor and/or acts done under color of law. See Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790 (1971) , United States v. Harris, 106 U.S. 629, 1 S.Ct. 601 (1882). The deciding Courts failed to apprehend and/or weigh the claims that state actors and/or acts under color of law fell within the bounds of 42 U.S.C. § 1983 as delineated by the Circuit Courts and this Court. For instance, petitioner showed that many wrongs claimed pursuant to law regarding powers of attorney and advance health directive all originated in an agreement between three estate-related defendants which was being enforced by a State Court and was arrived at pursuant to State action and law, and was causing action by private parties best accomplished

through legal channels. "[A]t least when the state creates a system permitting private parties to substitute their judgment for that of a state official or body, a private actor's mere invocation of state power renders that [private] party's conduct actionable [as a joint actor with the state] under § 1983." Cruz v. Donnelly, 727 F.2d 79 (3d Cir.1984). see Sament v. Hahnemann Medical College and Hospital of Philadelphia, 413 F.Supp. 434 (E.D.Pa.,1976) ("Private, individual conduct may be found to constitute state action (1) where state courts enforce agreement affecting private parties, (2) where state significantly involves itself with private party, or (3) where there is private performance of government function." Plaintiffs put forth equally solid arguments regarding co-issues like § 1983 liability of medical facilities, including in said State-created legal forum, and § 1983 relevance due to the numerous claims of violations of Acts of Congress.

The Circuit Court apparently upholds the decisions that private rights of action are not present, whereas the District Court discussed only one of several of plaintiffs' claims of private right of action, and yet dismissed in that aspect on an overall basis. A question regarding presence of right of action in the Assisted Suicide Funding Restriction Act has been addressed by the trial

Court, in the negative, and would be argued on appeal to be error of law. The defendants' claims that the law does hold a private right of action for such a count are threadbare and misleading.

Plaintiff asked leave to brief this matter as to each statute claimed to be violated. Also unaddressed is plaintiff's cause of action under section 1983 for violations of Acts of Congress. The Third Circuit has not addressed these and other issues which, despite plaintiff's objection that they deserve a cause by cause and party by party adjudication.

The District Court's declining to try the State related claims was a substantial error of law, even finding illogically that the State claims predominated, and where jurisdiction was being implored because plaintiffs had alleged that a State Court was overtly denying rights of due process and access to justice in a case in that Court addressing many of the claims now pursued in this case. Reversal of the affirming order is greatly warranted because the trial Court has erroneously granted dismissal of the Federal question claims in the entirety, whereas numerous of them are actually valid, timely, and substantial. Court must decline to decide the pendant state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so. Borough of West Mifflin

v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995), United Mine Workers v. Gibbs, 383 US 715, 726 (1966) see Guar. Trust Co. v. York, 326 U.S. 99, 111 (1945), cited in China Basin Props., Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1304 (N.D. Cal. 1992). (diversity jurisdiction established to prevent local prejudice in state courts by providing a neutral, federal forum.)

All of the above were raised in the proceedings and yet they escape notice or are erroneously decided by the courts below. The District Court has even abused discretion in making it necessary to make lengthy discussions like this to bring reviewing Courts to a basic understanding of the circumstances, and by catering to defendants' efforts to label the claims as rambling, exaggerated, or hypertechnical, to cause a similar prejudice from the start. Plaintiff raised the fact that the complaint was detailed in order to assist the motion to proceed in forma pauperis and explained the need to avoid re-writing until after motions to dismiss were evaluated (at which point it was too late).

For all of the above reasons, petitioner requests that the writ be granted, or for reversal or vacating with instructions.

B. Resolution of Errors Of Law and Reversal are Requested, of a Circuit Court's Affirming of Denial of An Urgent Motion To Reply To Responses To A Motion For Amendment Or Reconsideration Of A Concluding Order, and Affirming Of A Motion For Sanctions For False Pleading In The Proceeding Culminating At The Time Of The Motion For Amendment Or Reconsideration.

Again, as claimed in the preceding section, abuse of discretion has been inflicted on this fully triable case. This is supported by errors in law, misapprehension of fact, and failure to address many issues of law and fact.

Motion To Supplement the Record

Reference is made to the preceding subsection regarding the motion for amendment or reconsideration, in which that motion (like the federal questions) is shown to be strongly supported and thus abuse of discretion likely in it's denial.

The motion to supplement, which sought leave

to respond to responses to the rehearing request, was greatly warranted because it was new evidence and was evidence of perjury present in the proceedings right up to that time. Defendants cannot be permitted to swing the record with mistruths in the closing chapters of a pretrial controversy.

The Third Circuit has erred in allowing this as a matter of law and alsobecause plaintiff correctly presented the response as a motion for leave to file. Also the Third Circuit found that a 20 day period for amendment of a pleading does not, due to definition of a "pleading," pertain to motions for reconsideration, but ignored petitioner's claim that all prior post-dismissal motions had taken considerably longer periods of time, which in fact supports a finding of partiality where haste indicated a discernible effort to prevent further objections by a party. Plaintiffs' allegations of perjury exceed the threshold for discretionary adjudication and did in fact gain the ear of the District Court, which awaited the motion for sanctions predicted in the prior pleading.

The appeal in reality offers a strong instance of multiple error causing manifest injustice.

Plaintiffs therefore respect request amendment

or vacating of the finding of insufficiency of the motion for amendment and reconsideration, and such action deemed worthy, including leave to amend the motion for amendment or reconsideration and/or the reply to responses to said motion.

The Motion for Sanctions

In the other affirming of a post-conclusion pleading, the Third Circuit has affirmed denial of a motion for sanctions filed in regard to persistent falseness in the pleadings. Abuse of discretion has taken place, notably, by way of the Third Circuit's finding that such was a matter for appeal, not a post trial motion, and that perjurious circumstances a) do not equate with an improper purpose or a misleading of a Court, and b) do not constitute new evidence under the rules regarding rehearing, amendment, and reconsideration.

The Third Circuit has relied on a finding that the matter of the motion for sanctions was a matter for appeal, yet, as a pleading filed in conjunction with a post-trial motion for amending or vacating pursuant to new evidence, coupled with

a motion for costs or sanctions, appeal would not have been possible, or would have resulted in remand, since the evidence needed elaboration, as is now requested herein. Thus the very reason for urgently and diligently bringing the issue to the district Court's attention is now precluded review by the Third Circuit's designation of the issue as non-jurisdictional both in timeliness (which diligence and subject matter are believed to have prevented) and now also in subject matter per se, despite it's standing as new evidence or, at the least, partially new evidence supporting a valid claim of perjury.

Plaintiffs' motion, while it referred to 28 USC §1927 and Rule 11 motion, contained far less emphasis on the Rule 11 motion. It requested, by conjunction with the motion to supplement and motion for opening of reconsideration, adjudication of a stark issue of misrepresentation to the Courts that was ultimately not expressly challenged until after the order deemed final. The trial Court has addressed the motion for sanctions in the decision and affirmed it. Plaintiffs at each Court requested evidentiary proceedings on the claims of falseness.

The Third Circuit has also found that plaintiff "did not supply any basis from which the District Court" could conclude that statements were made "for an improper purpose" such as "misleading the

Court", yet this is exactly what plaintiff has stated, and he has claimed falseness made for this express purpose.

The Third Circuit makes the above statement regarding the motion for sanctions and the motions for reconsideration and to supplement. However, the motion to supplement the record (with proposed reply and motion to add counts attached) was the pleading that drew in the claim of falseness, subsequently addressed in greater detail in the motion for sanctions, into the proceeding, and it did so expressly, thus formally causing the continuum of major issues (present to any observer regardless) which causes the deciding of these to be the final order.

The Third Circuit was also requested to amend the conclusion that appeal, as opposed to a motion for sanctions, was the place to address the new evidence of falsity in the pleadings. These pleadings, as an inter-referenced set of pleadings, clearly addressed a strong claim of falsity in the District Court, that was raised in a very diligent manner as soon as it became evident. Plaintiffs, if waiting for appeal to address the perjurious nature of the proceedings below, stood the risk of seeing the issue waived or at the least having it diminished in importance, or for untimeliness.

While de novo review was feasible, it would be

inappropriate for the Third Circuit to make factual determinations based upon conflicting evidence. Conflicting evidence is exactly what has resulted from the filing of the motion for sanctions and the motion.

Petitioner therefore requests review, reversal or remand with instructions that the District Court hold an evidentiary hearing, as had loomed more and more necessary for the duration of the proceedings.

C. Whether a trust estate beneficiary, trustee ad litem, co-contractee, and additionally qualified son of the deceased may litigate torts on behalf of the deceased, that were experienced together with the deceased, pursuant to existing authorities, which do not delineate the specific circumstances present in this case.

The Third Circuit has stated in a footnote on page 2 of the opinion that James Schneller may not represent any other plaintiffs pro se, referring to their similar finding in a prior non precedental opinion appeal in this case. No party nor a Court may cite a non-precedental opinion nor a footnote therein. The original finding stated in the

footnote was also a footnote, and was a sua sponte legal conclusion. The Circuit Court has, at the least, erroneously allowed itself to be prejudiced by plaintiff's efforts to represent the deceased

It is plaintiff's contention that the raising of this issue sua sponte exhibits prejudice and error of law, and in fact the conclusion of law is markedly reversible error.

The finding that as a non-attorney, James D. Schneller may not appear as an attorney for any other parties, is opposable with sound argument. This is true both as to James's capacities on behalf of an estate, and regarding suing on behalf of the Pa.R.C.P. 2202 "parties entitled to relief" under the Pennsylvania wrongful death statute. 42 Pa.C.S.§§ 8301, 8302. Each of these may constitute a legal question of first impression. The authority stated, Osei-Afriyie v. Medical College of Pa., 937 F.2d 876, 882 (3d Cir. 1991), holds only that a non-attorney parent could not represent his children in a tort action in federal court." In relevant decision Collinsgru v. Palmyra Board of Education, 161 F.3d 225 (3d Cir., 1998), the Third Circuit found that parents could not represent their son pro se in an action under the "Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1994 & Supp. 1997) These are limited to the parent-representing-child situation, which is far different from the within circumstance of adult child, who shared the harms.

In the decision Pridgen v. Anderson, 113 F.3d 391 (2d Cir. 1997), the Second Circuit has held that "an administratrix or executrix of an estate may not proceed pro se when the estate has beneficiaries and creditors other than the litigant. James Schneller, however, besides holding the capacities stated in the first paragraph, is the last remaining living beneficiary of the two parental trusts, and the estates are closed according to the defendants Schneller and Zitomer, who domineered the estates. Any award in this litigation is certain to be requested to be unavailable to those, who are the only other feasible beneficiaries, under the Pennsylvania Slayer's Act 20 Pa.C.S.§8801. Moreso, the continuing trusts benefit only plaintiff, and plaintiff may lawfully represent the honor and the integrity of the trusts in their overall substance, especially since the sole trustee, First National Bank of Chester County, has repeatedly declined to do so. The deeds of trust in fact continue support for the other living spouse, on into that for James Schneller, causing to petitioner a right to defend the principal and litigate infractions inflicted on the principal (and the trustors) at any time, notably, at times of great mishap to some of the beneficiaries, survived now only by James.[1] The

[1] Plaintiff argued numerous reasons for capacity to sue, and one of which, the right to sue as co-

extraordinary circumstances of this case, including obstruction, ineffective prior counsel, oppression, and intent to ruin the case in the eyes of prospective counsel, are not present in any published decision deciding the claimed doctrine of forbiddance of prosecution by pro se litigants.

Petitioner therefore would argue on granting of the writ that this finding be reversed and that the bias it has inflicted on the appeal support reversal and remand.

VI. CONCLUSION

Petitioner has not made his full arguments in this petition but has sought to overcome any perception of the petition as inadequate, through volume. The case after all contains a volume of

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contractee with the deceased for medical and legal services, enables capacity (and therefore a right to represent pro se) as the real party in interest. Pa R.C.P. 2002 ("a person with whom or in whose name a contract has been made for the benefit of another.")

claims, and has experienced a volume of error. This case deals with outright deprivals of civil rights including the very rights to live, to defend life, to speak, to eat, to breathe, and to seek urgent medical care, outrageously deprived to a plaintiff.

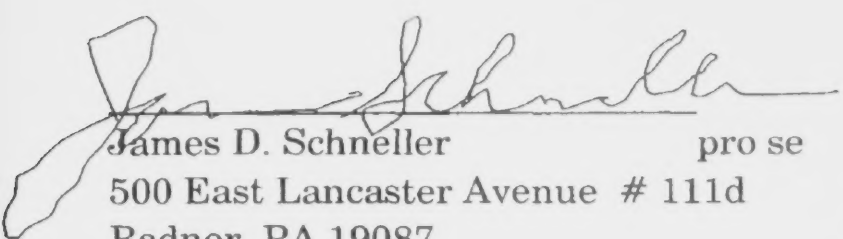
The Third Circuit, plaintiffs' last resort, has decided in a way that conflicts with the United States Constitution and with decisions of Circuit Courts, and this Court. The case is not worthy of dismissal.

There is, in the contested Orders, a furthering of deprival of access to justice, remedy for injury, and deprival of property to plaintiffs, in derogation of the United States Constitution. Injustice is apparent. To perform its high function in the best way, justice must satisfy the appearance of justice. In re Murchison, 75 S.Ct. 623 (U.S.Mich.,1955) Access to the courts encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all the charges brought against him or grievances alleged by him. Com. ex rel. Matherly v. Frame, 21 Chest. 283 (Pa.Com.Pl.,1973) Abuse occurs where actions are taken that are intentional or "motivated by bias, bad faith, or partisan or personal motives unrelated to the merits of the matter before it." Rogers v. Bucks County Domestic Relations Section, 959 F.2d 1268, 1277 (3d Cir.1992).

Petitioner, for the above reasons, respectfully requests an order granting certiorari over this case, and review of the orders entered in the Court of Appeals, so that a fair and just determination may be made.

Petitioner has requested in the opening section that consolidation be considered and that deferral of the substance of the argument be permitted or that the Court await a nearly identical petition for writ of certiorari due in the Court in ten (10) days time.

Petitioner, in the alternative, requests that the Court vacate the order of the 3d Circuit dismissing the appeal No. 09-4577, and affirming denial of the motion for sanctions and motion to supplement the record, based on the error of these decisions that is clear in the record as stated in this petition.



James D. Schneller pro se
500 East Lancaster Avenue # 111d
Radnor, PA 19087

Date: July 1, 2010

VIII. TEXTS OF PERTINENT STATUTES

Petitioner requests alleviation of the requirement to attached texts of pertinent statutes because no statute rises to the level of importance that would cause a need for highlighting it before the Court.

APPENDIX

ALD-13S **NOT PRECEDENTAL**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No.09-4577

JAMES D. SCHNELLER, HEIRS AND BENEFICIARIES OF
MARJORIE C. SCHNELLER, BY JAMES D. SCHNELLER,
TRUSTEE AD LITEM ESTATE OF MARJORIE SCHNELLER, BY AND THROUGH
JAMES D. SCHNELLER, TRUSTEE AD LITEM;
MARJORIE ZITOMER,
EXECUTRIX OF THE ESTATE OF MARJORIE SCHNELLER

V.

FOX SUBACUTE AT CLARA BURKE; GARY DRIZIN, M.D.;
DEBBIE MCCOY, R.N.; MARJORIE ZITOMER; G RICHARD SCHNELLER
T. SERGEANT PEPPER, ESQ. HEPBURN, WILCOX, HAMILTON &
PUTNAM, L.L.P.; PENNSYLVANIA DEPARTMENT OF AGING, .
PENNSYLVANIA DEPARTMENT OF HEALTH, DIVISION OF NURSING
CARE FACILITIES, NORRISTOWN FIELD

OFFICE; GARY LAYMAN;
JUDITH FOLAN; SAMUEL J. TRUEBLOOD
ESQ.;
TRUEBLOOD & AMACHER, L.L.P.

James D. Schneller, Appellant

On Ap:peal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-06-cv-01504)
District Judge Honorable Lawrence F. Stengel

Submitted by the Clerk for Possible Dismissal for
Lack of Jurisdiction or Summary Action Pursuant
to Third Circuit LAR 27.4 and I.O.P. 10.6

February 25,2010

Before: SLOVITER, AMBRO and SMITH, Circuit
Judges

(Opinion filed: March 8,2010)

OPINION

PER CURIAM

Appellant James D. Schneller, proceeding pro se, appeals from the District Court's dismissal of his action and denial of his post-judgment motions. For the reasons that follow, we will dismiss in part for lack of jurisdiction and otherwise summarily affirm the judgment of the District Court.

In 2006, Schneller flied a civil action against a number of defendants stemming from the death of his mother in 2002 and the subsequent administration of his parents' estate.[2] In an opinion and order entered on June 26, 2009, the District Court dismissed all of his claims and order the case

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[2] Schneller filed his complaint pro Se. In it, he purported to represent other persons and entities. As a pro Se litigant, Schneller may not represent parties other than himself. See Osei-Afrivie v. Med. Coll. Of Fa., 937 F.2d 876, 882-83 (3d Cir. 1991) (holding that non-lawyer proceeding pro se could not represent his own children); 28 U.S.C. § 1654 (parties may proceed in federal court "personally or by counsel"). Accordingly, we will treat him as the sole Appellant in this appeal. See also Schneller v. Fox Subacute at Clara Burke, 317 F. App'x 135, 137 n.1 (3d Cir. 2008).

closed. On July 10, Schneller timely filed a motion for reconsideration which was denied on August 4,2009. On August 11, Schneller filed a motion to "supplement thc record," followed by a motion for sanctions and costs on September 2. The District Court entered two orders denying Schneller's post-judgment motions on September 8, 2009. On October 8 2009, Schneller filed a six-page document entitled "Plaintiffs' Motion for Leave to Appeal In Forma Pauperis" which detailed the errors allegedly made by the District Court in dismissing Appellant's complaint and denying his post-judgment motions and requested leave to appeal in forma pauperis The District Court granted him leave to appeal in forma pauperis on October 27, 2009, and Schneller filed a document entitled "Notice of Appeal" on December 2, 2009.[3]

Appellant seeks to appeal both the District Court's dismissal of his action and its denial of his post-judgment motions. The District Court's

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[3] The document was dated November 6, 2009, but file-stamped December 2, 2009. In his response, Appellant argues that it was filed on November 10, 2009, but does not provide any support for this assertion. As we explain herein, whichever of these dates we use, the notice of appeal was untimely filed with respect to the dismissal of the action and denial of reconsideration.

judgment dismissing the underlying action became final on August 4, 2009, when the District Court denied Appellant's timely-filed motion for reconsideration.[4] See 28 U.S.C. § 1291 (vesting jurisdiction in courts of appeals over "final decisions" of the district courts); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199-200(1988) (holding that a final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment, and that a question remaining to be decided after entry of such a decision does not affect its finality). Because Schneller failed to file a notice of appeal within thirty days of entry of that order, we lack jurisdiction over the District Court's June 26, 2009 opinion and order dismissing his action and its August 4, 2009 order denying his motion for reconsideration. See Fed. R. App. P.

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[4] Because the motion for reconsideration was filed within ten business days of the District Court's entry of judgment, the time to file a notice of appeal from the June 26, 2009 dismissal was tolled until the District Court denied the motion for reconsideration on August 4,2009. See former Fed. R. Civ. P.59(e) (amendment effective Dec. 1,2009). Appellant's subsequent motions to supplement the record and for sanctions do not fall within the subset of post-judgment motions which toll the time for filing a notice of appeal. See Fed. R. App. P. 4(a)(4)(A).

4(a)(1); Bowles v. Russell, 551 U.S. 205, 213(2007) (holding that the timely filing of a notice of appeal is a jurisdictional requirement).

However, the District Court's September 8, 2009 denials of Appellant's post-judgment motions are separately appealable. See Pennsylvania v. Flaherty, 983 A.2d 1267, 1276 (3d Cir. 1993) ("Post judgment orders are final for purposes of § 1291 and immediately appealable because the policy against piecemeal review is unlikely to be undermined."). On October 8, 2009, Appellant filed a document entitled "Plaintiffs' Motion for Leave to Appeal In Forma Pauperis" which specified those orders he wished to appeal, the grounds he wished to appeal them on, and the court he wished to appeal them to. The District Court should have treated this document as a notice of appeal. Fed. R. App. P. 3(c)(1); Masquerade Novelty v. Unique Indus., 912 F.2d 663,665 (3d Cir. 1990) (explaining that "a party wilt be deemed to have complied with Rule 3(c) if it has, within the time provided to file an appeal, filed documents that 'specify the party or parties taking the appeal; . . the judgment, order or part thereof appealed from; and . . . the court to which the appeal is taken"). Because this document was timely-filed with respect to the District Court's denial of Appellant's motions to supplement the record and for sanctions, we have jurisdiction to consider his appeal from those

orders. See Fed. R. App. P. 4(a)(1); Flaherty, 983 F.2d at 1276.

In his motion to supplement the record, Schneller argued that he should have been permitted more time in which to respond to appellees' oppositions to his motion for reconsideration. Schneller relied on Rule 15(a) which, at the time he filed his motion, allowed a party 20 days in which to amend a pleading as a matter of course. See former Fed. R. Civ. P.15(a) (amendment effective Dec. 1,2009). A Rule 59(e) motion for reconsideration, however, is not a pleading. See Fed. R. Civ. P. 7(a). And, as Schneller appears to recognize, Judge Stengel's procedures do not permit reply briefs to be filed as a matter of course, but only when leave to file them has been requested and granted. Thus, the District Court was under no obligation to permit Schneller to file a reply Furthermore, there is no reason to believe Schneller's reply to appellees' oppositions would have affected the District Court's decision. Schneller attached his proposed reply to his motion to supplement the record. Neither his original motion for reconsideration nor his proposed reply set forth any basis on which a motion for reconsideration could have been granted by the

District Court.[5]

In his motion for sanctions and costs, Schneller argued that, pursuant to Federal Rule of Civil Procedure 1 1 and 28 U.S.C. § 1927, appellees should be sanctioned for filing frivolous and vexatious motions and pleadings for the purpose of causing unnecessary delay and increasing the cost of the litigation. While Schneller set forth the facts and legal arguments made by appellees that he disagreed with, he did not provide any basis from

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[5] In his motion for reconsideration, Schneller recognized that motions for reconsideration are sparingly granted and require either the presence of new evidence not previously available, an intervening change in the controlling law, or the need to correct a clear error of law or fact or to prevent manifest injustice. See Max's Seafood Cafe' ex rel. Lou-Ann Inc. v. Quinteros, 176 F.3d 669,677 (3d Cir. 1999). Nonetheless, his motion failed to allege that any of those circumstances were present. Rather, it speculated that the District Court may have" misapprehended facts or misapplied law and that it "may have" erred in reaching certain conclusions, but did not present any specific legal issue which was clearly incorrectly decided or point to any new evidence or intervening change in the case law that would have supported reconsideration. Nor did his proposed reply satisfy any of these criteria.

which the District Court could have concluded that appellees alleged those facts or made those arguments "for an improper purpose" or with the intent of "misleading the court." Schneller's motion for sanctions was not the proper vehicle for challenging these assertions and arguments - appeal was- Because Schneller failed to timely appeal from the District Court's dismissal of this action and denial of his motion for reconsideration, we cannot consider these arguments at the present time.

Because Schneller's appeal presents no substantial question, we will summarily affirm the orders of the District Court denying the requested relief See 3d Cir. LAR 27.4; I.O.P. 10.6. Schneller's appeal from the District Court's dismissal of his action and denial of his motion for reconsideration is dismissed for lack of appellate jurisdiction. See Fed. R. App. P. 4(a)(1); Bowles, 551 U.S. at 213.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No.09-4577

JAMES D. SCHNELLER, HEIRS AND BENEFICIARIES OF

MARJORIE C. SCHNELLER, BY JAMES D. SCHNELLER,

TRUSTEE AD LITEM ESTATE OF MARJORIE SCHNELLER, BY AND THROUGH

JAMES D. SCHNELLER, TRUSTEE AD LITEM; MARJORIE ZITOMER,

EXECUTRIX OF THE ESTATE OF MARJORIE SCHNELLER

v.

FOX SUBACUTE AT CLARA BURKE; GARY DRIZIN, M.D.;

DEBBIE MCCOY, R.N.; MARJORIE ZITOMER; G RICHARD SCHNELLER

T. SERGEANT PEPPER, ESQ. HEPBURN, WILCOX, HAMILTON &

PUTNAM, L.L.P.; PENNSYLVANIA DEPARTMENT OF AGING, .

PENNSYLVANIA DEPARTMENT OF HEALTH, DIVISION OF NURSING

CARE FACILITIES, NORRISTOWN FIELD OFFICE; GARY LAYMAN;

JUDITH FOLAN; SAMUEL J. TRUEBLOOD ESQ.;

TRUEBLOOD & AMACRER, L.L.P.

James D. Schneller, Appellant

On Appeal from the United States District Court

for the Eastern District of Pennsylvania

(D.C. Civil No. 2-06-cv-01504)

District Judge: Honorable Lawrence F. Stengel

Submitted by the Clerk for Possible Dismissal for Lack of Jurisdiction

or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

February 25,2010

Before: SLOVITER, AMBRO and SMITH, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted by the Clerk for possible dismissal for lack of jurisdiction or summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on February 25,2010. On consideration whereof; it is now hereby

ORDERED and ADJUDGED by this Court that the appeal is dismissed in part for lack of jurisdiction and the orders of the District Court entered September 8, 2009, be and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron Clerk

DATED: 8 March 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES D. SCHNELLER, et al., CIVIL ACTION

Plaintiffs

v. NO. 06-1504

FOX SUBACUTE

AT CLARA BURKE

Defendants

MEMORANDUM

STENGEL, J. June 25, 2009

Four years after the death of his elderly mother on March 31, 2002, James D. Schneller and allegedly three other plaintiffs[1] filed a pro se

[1] These plaintiffs include: (1) Heirs and beneficiaries of Marjorie C. Schneller, by James D. Schneller, trustee ad/item; (2) Estate of Marjorie Schneller, by and through James D. Schneller, trustee ad/item; and (3) Marjorie Zitomer executrix

action against several defendants[2] whom he claims are legally responsible. The genesis of the case appears to be medical and legal malpractice as a result of the allegedly negligent services rendered to Mr. Schneller's parents during the last few months of their lives. I dismissed the case based on lack of jurisdiction before service was perfected. See Schneller et al. v. Fox Subacute at Clara

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of the Estate of Marjorie Schneller (Miss Zitomer is Mr. Schneller's sister and also a defendant in this action). The Third Circuit noted: "Schneller filed his complaint pro se. He also purports to represent other persons and entities. Although Schneller is entitled to represent himself pro se, he 'may not appear pro se in the cause of another person or entity.'" Schneller et al. v. Fox Subacute at Clara Burke. et al 2008 U.S. App. LEXIS 8777, *2 n.1 (3d Cir. 2008). Accordingly, I will refer to Mr. Schneller as the sole plaintiff.

[2] The thirteen defendants include: (1) Fox Subacute at Clara Burke; (2) Gary Drizin, M.D.; (3) Debbie McCoy, R.N.; (4) Marjorie Zitomer (5) G Richard Schneller (the plaintiffs brother); (6) T. Sergeant Pepper, Esq. (7) Hepburn, Wilcox, Hamilton and Putman, LLP; (8) Pennsylvania Department of Aging; (9) Pennsylvania Department of Health, Division of Nursing Care Facilities - Norristown Field Office; (10) Gary Layman; (11) Judith Folan; (12) Samuel J. Trueblood Esquire; and (13) Trueblood & Amacher LLP.

Burke. et al., No.06-1504, 2006 U.S. Dist. LEXIS 21054, *7-8 (E.D. Pa. April 18,2006). On appeal, the Third Circuit Court of Appeals vacated the dismissal, holding that the plaintiff should have been given an opportunity to amend his complaint. Schneller et al. v. Fox Subacute at Clara Burke. et al., 2008 U.S. App. LEXIS 8777*2 n.1 (3d Cir. 2008). On December 5, 2008, Mr. Schneller filed an amended complaint which added a count for injunctive relief. See Document #33.

There are four groups of defendants [3] which have filed motions to dismiss. For the following reasons, I will grant the motions to dismiss in their entirety.

1. BACKGROUND

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[3] The defendants are grouped as follows: 1) the Commonwealth defendants; 2)Defendant T. Sergeant Pepper, his law firm, and the plaintiffs brother and sister; 3) Defendant Samuel Trueblood his law firm, and Defendant Gary Drizin; and 4) Defendants Fox Subacute at Clara Burke and Debbie McCoy. Defendants Gary Layman and Judith Folari have not responded to the amended complaint which lists them as employees of the Commonwealth defendants. See Am. Compl. ii.

In October 2004, Mr. Schneller began a series of actions against the defendants in the Courts of Common Pleas of various counties within the Eastern District of Pennsylvania. The cases were dismissed through entries of judgment non pros for failure to file Certificates of Merit as required by Rule 1042.3 of the Pennsylvania Rules of Civil Procedure. Mr. Schneller unsuccessfully attempted to re-open the cases and/or strike the judgment of non pros. He then appealed this case to the Pennsylvania Superior Court which affirmed without an opinion. The Pennsylvania Supreme Court denied his petition for allowance of appeal. Finally, the United States Supreme Court denied the plaintiffs petition for writ of certiorari. Schneller v. Fox Subacute at Clara Burke. et al., 128 S.Ct. 56 (2007).

The eighty-two (82) page amended complaint contains six-hundred thirty-two (632) paragraphs purporting to provide the basis of the plaintiffs twenty-eight (28) claims:

Count 1A - Violation of the Assisted Suicide Funding Restriction Act of 1997

Count 1B - Civil Action for Deprivation of Rights

Count 1C - Conspiracy to Interfere with Civil Rights - Depriving Persons of Rights and Privileges

Count 1D - Conspiracy to Interfere with Civil Rights Obstructing Justice and Intimidating Parties

Count 1E - Neglect to Prevent Deprivation of Rights and Conspiracy for Deprivation of Rights - Failure to Warn .

Count 2 - Breach of Contract

Count 3 - Breach of Contract

Count 4 - Fraudulent and Negligent Inducement of Contracts

Count 5 - Deprival of Due Process, Negligence and Intentional Tort by Government Agency

Count 6 - Wrongful Death

Count 7 - Survival

Count 8 - Intentional Tort - Abuse of Power of Attorney and Advance Health Directive

Count 9 - Negligence Per Se (violation of sixty-five state and federal statutes)

Count 10 - Battery

Count 11 - Battery - Lack of Informed Consent

Count 12 Survival - Negligent and Intentional Infliction of Emotional Distress

Count 13 Survival Action - Damages to Estate of Deceased

Count 14 - Survival - Punitive Damages

Count 15 - Negligence and Intentional Tort By Licensed Medical Defendants

Count 16 - Negligence and Intentional Tort Against Legal Professional Defendants

Count 17 - Fraud and Intentional Misrepresentation

Count 18 - Conspiracy

Count 19 - Breach of Confidential Relationship

Count 20 - Negligent and Intentional Infliction of Emotional Distress

Count 21 - Tortious Interference with Present and Prospective Economic Advantage

Count 22 - Tortious Interference with Inheritance

Count 23 - Punitive Damages

Count 24 - Injunctive relief to restrain various defendants from the unscrupulous decisions to end life, or to deny the rights granted by law.

Mr. Schneller also alleges violations of various Long Term Care Facility regulations, including: 42 CFR. § 483.10, 42 CFR. § 483.15, and 42 CFR. §

483.25. [4] See Am Compl. 21.

II. STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under Rule l 2(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41,45-46(1957). The factual allegations must be sufficient to make the claim for relief more than just speculative. Bell Atlantic Corn. v. Twombly, 550 U.S. 544, 555 (2007). In determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable

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[4] These provisions "contain the requirements that an institution must meet in order to qualify to participate *as a* [skilled nursing facility] in the Medicare program, and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." 42 C.F.R. § 483.1(b). These regulations do not confer a pri-

inferences in favor of the plaintiff. Id . see also D.P. Enters v. Bucks County Cmty.Col1., 725 F.2d 943,944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiffs claim and the grounds upon which it rests. Id. The "complaint must allege facts suggestive of [the proscribed] conduct." Twombly, 550 U.S. at 555. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion School Dist., 132 F.Sd 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pennsylvania Transy. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). The claim must contain enough factual matters to suggest the required elements of the claim or to "raise a reasonable expectation that discovery will reveal evidence of' those elements. Phillips v. Countv of Allegheny, 515 F.2d 224,234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 555).

A case may be also dismissed under Rules 12 (b)(1) and 12 (h)(3) of the Federal Rules of Civil Procedure "[w]henever it appears by suggestion of

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vate right of action. Accordingly, they provide no basis for jurisdiction pursuant to 28 U.S.C. § 1331

the parties or otherwise that the court lacks jurisdiction of the subject matter...." Fed.R.Civ.P. 12(h)(3). Alternatively, a court choosing not to grant a motion to dismiss for lack of subject matter jurisdiction may, under Rule 12(e), grant a motion for a more definitive statement if "a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . ." Fed.R.Civ.P. 12(e).

Moreover, courts must liberally construe pro se complaints and "apply the applicable law, irrespective of whether [the] litigant has mentioned it by name." Higgins v. Bever, 293 F.3d 683, 688 (3d Cir. 2002). Thus5 a plaintiffs complaint, however inartfully pleaded, must be held to a less stringent standard than a formal pleading drafted by an attorney. Estelle v. Gamble, 429 U.S. 97,106 (1976).

III. DISCUSSION

A. Non-Commonwealth Defendants - Federal Claims

These defendants primarily argue that the case should be dismissed because this court does not have subject matter jurisdiction. Federal courts are courts of limited jurisdiction, and they may only decide cases as authorized by Congress or the Constitution. District courts have subject matter jurisdiction over federal questions pursuant to 28 U.S.C. § 1331, in which Congress grants courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Federal courts also have subject matter jurisdiction over cases where there is complete diversity of citizenship among the parties and the amount in controversy "exceeds the sum or value of $75,000, exclusive of interest and costs" pursuant to 28 U.S.C. § 1332(a).[5] The requirement of complete diversity means that 'jurisdiction is lacking if any plaintiff and any defendant are citizens of the same state." Menan Co. v. Atl. Mut.

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[5] Title 28 U.S.C. § 1332(a) provides: The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between: (1) citizens of different states; (2) citizens of a state and citizens or subjects of a foreign state; (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state as plaintiff and citizens of a state or of different states.

Ins. Co., 147 F.3d 287, 290 (3d Cir. 1998) (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267,2 L. Ed. 435 (1806)).

When a motion to dismiss for lack of subject matter jurisdiction is before a court, "the person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of litigation." Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). This burden is applicable to cases based on diversity jurisdiction as well, and in such cases a plaintiff must demonstrate complete diversity between the parties and that the amount in controversy requirement has been met. Quaker State Dyeing & Finishing Co.. Inc.. v. ITT Telephone Com., 461 F.2d 1140, 1143 (3d Cir. 1972) (citing McSparran v. Weist, 402 F.2d 867, 875 (3d Cir. 1968)).

Here, the plaintiff and eleven defendants are residents of Pennsylvania. The plaintiffs' brother and sister are citizens of Virginia and New York, respectively. There is clearly no complete diversity of citizenship. Thus, jurisdiction cannot be based on 28 U.S.C. § 1332. The defendants, however, also argue that the amended complaint fails to present a federal question sufficient to confer jurisdiction. Federal question jurisdiction exists in one of two circumstances: (1) where federal law creates the cause of action; or

(2) where the complaint poses a substantial federal question. Sodi v. Discover Financial Services, 2004 U.S. Dist. LEXIS 24133, *8 (E.D. Pa. 2004). Here, the plaintiffs alleged bases for federal question jurisdiction fall into two categories: (1) alleged violations of federal statutes and regulations; and (2) alleged civil rights violations.

Mr. Schneller cites several federal statutes and regulations throughout his amended complaint. Of the twenty-eight counts contained in the amended complaint, however, only seven counts attempt to set forth federal causes of action. The first count alleges a ~ 16 violation of the Assisted Suicide Funding Restriction Act of 1997, 42 U.S.C. § 14401, et seq. See Am. Compl. 95-107. This Act, however, does not create a private right of action, and thus cannot provide the basis for jurisdiction.

If Congress intends to create a private cause of action under a federal statute, then federal courts should find a private cause of action under the given statute. Transamerica Mortgage Advisors. Inc. v. Lewis, 444 U.S. 1 1, 15(1979). Congress' intent is determined by examining "the language or structure of a statute or the circumstances of its enactment." Id "[W]hether a statute creates a cause of action, either expressly or by implication,

is basically a matter of statutory construction." Id. If the language of the statute expressly gives a remedy liken courts should be wary when they are requested to add an additional remedy that is not expressly provided for in the statute. Id.

The structure and language of this Act do not show any intent by Congress to establish a private cause of action. The purpose of the Act is "to continue current federal rights pursuant to 42 U.S.C. § 1983 and related statutes. Because they contemplate a private cause of action, these statutes provide subject matter jurisdiction to the court. Counts 1B, 1C, 1D, and IE set forth the plaintiffs civil rights claims against the defendants for alleged violations of his mother's rights guaranteed by the Fourteenth Amendment to the United States Constitution. Count 1B contains allegations that the defendants, under color of state law, deprived Mrs. Schneller of life, liberty, and property by enforcing her advanced health care directive over Mr. Schneller's objection and causing her death. See Am. Compl. 213-230. Count 1C claims that the defendants conspired with malice to deprive Mrs. Schneller "of her basic rights to eat, drink, and breathe," and her "rights to life, safety, freedom of speech, freedom to write and communicate, privacy, family interaction, rights to legal representation, and general well-being." See Am. Compl. 231-248. Count ID alleges

that the defendants "conspired for the purpose of impeding, hindering, obstructing, and defeating the due course of justice enjoyed by citizens, with the intent to deny plaintiffs the equal protection of the laws," and that these acts constituted causes of action for intimidation, confusion, diversion, threat, and obstruction of justice, as well as criminal assault and criminal maiming. Am. Compl. 249-263. Finally, Count IF alleges that the defendants, "having knowledge that any and all of the wrongs conspired to be done as enumerated in this complaint, were about to be committed, and having power to prevent or aid in preventing the commission of the same, neglected or refused so to do." See Am. Compl. 264-272.

The Fourteenth Amendment to the U.S. Constitution provides that "no State shall.. deprive any person of life, liberty, or property, without due process of law..." U.S. Const., Amend. 14, § 1 - The protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights, no matter how unfair that conduct may be. National Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179(1988). It is the duty of this court to ensure that the Fourteenth Amendment is invoked only when it can be said that the State is responsible for the specific conduct of which the

plaintiff complains. Brentwood Acad. v. Tennessee Secondanry Sch. Athletic Ass'n, 531 U.S. 88, 296 (2001), Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991); Blum v. Yaretsky, 457 U.S. 991(1982). If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'Under color of state law" for Section 1983 purposes. Brentwood Acad., 531 U.S. at 295 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922(1982)).

Title 42 U.S.C. §1983 authorizes redress for violations of constitutional rights and provides, in pertinent part, that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by . the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983. By its terms, Section 1983 does not create a substantive right; it merely provides a method for vindicating federal rights conferred by

the United States Constitution and the federal statutes that it describes. Baker v McCollan, 43 U.S. 137 (1979). In order to establish a claim under Section 1983, a plaintiff must demonstrate (1) a violation of a right secured by the Constitution and the laws of the United States and that (2) the alleged deprivation was committed by a person acting under color of state law. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

Here, Mr. Schneller fails to satisfy these requirements where the non-Commonwealth defendants are concerned. Although a private party may cause a deprivation of a constitutional right, it is subjected to liability under Section 1983 only when it does sounder color of state law. Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978). Section 1983 excludes from its reach "merely private conduct," no matter bow discriminatory or wrongful. American Mfrs. Mut. Ins. Co., 526 U.S. at 50. Mr. Schneller baldly asserts that these non-commonwealth defendants were acting under color of law or were state actors. The actions alleged here, however, were not performed under color of state law, and the defendants are not and cannot be considered state actors.

The traditional exclusive governmental function test requires that a private entity exercise powers traditionally and exclusively reserved to the State, such as holding an election or eminent domain. Wolotsky v. Ruhn, 960 F.2d 1331,1335(6th Cir. 1992). The provision of hospital services is not a traditional public function exclusively reserved for the State. Shannon v. Shannon, 965 F.2d 542, 547 (7th Cir. 1992) (hospital care is not an exclusive prerogative of the State).

When analyzing the exclusive government function test, the Supreme Court has held that the receipt of public finds and the performance of a function serving the public, alone, are not enough to make a private entity a state actor. Rendell-Baker v. Kohn, 457 U.S. 830, 840(1982); Black et al. v. Indiana School District, 985 F.2d 707,710-11 (3d Cir. 1993) (a school bus driver is not performing an exclusive government function, even though paid by the state and performing a service for the public). The fact that hospitals and nursing homes may be extensively regulated and may receive financial support from the government through Medicaid and Medicare does not make them state actors. Blum 457 U.S. at 1011. In Blum, the Supreme Court flatly rejected the argument that the State's payment of more than 90% of nursing home patients' medical expenses and the licensing of nursing homes does not create a

symbiotic relationship between the state and nursing homes. Additionally, the vast majority of Courts of Appeals have determined that the recipient of federal construction funding, Medicare and Medicaid funds, and the existence of tax exemption, as well as state licensing requirements for non-profit hospitals, do not constitute state action under 42 U.S.C. § 1983. See Hodge v. Paoli Memorial Hospital, 576 F.2d 563 (3d Cir. 1978) (citing Schlein v. Milford Hospital. Inc. 561 F.2d 427 (2d Cir. 1977); Greco v. Orange Memorial Hospital Corporation, 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000(1975); Jackson v. Norton-Children's Hospitals. Inc., 487 F.2d 502(6th Cir. 1973), cert. denied, 416 U.s. 1000(1974); Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976); Watkins v. Mercy Medical Center, 520 F.2d 894(9th Cir. 1975); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973)).

Accordingly, the receipt of federal funding is not determinative of state action. Private entities are not transformed into state actors by the simple provision of funds. Because Mr. Schneller cannot establish state action, he cannot establish a cause of action under 42 U.S.C. § 1983 or related statutes, which provide a necessary conduit through which the plaintiff might recover for alleged federal rights violations perpetrated

against him. Accordingly, I will dismiss the non-Commonwealth defendants from Counts IIB, IC, ID, and IE.

B. Commonwealth Defendants Federal Claims

Mr. Schneller also seeks damages and equitable relief under § 1983 against the Pennsylvania Department of Aging, and the Pennsylvania Department of Health, Division of Nursing Care Facilities - Norristown Field Office. These departments are executive agencies of the Commonwealth of Pennsylvania. See 71 P.S. §§ 11, 61, 531-551 (Health); and 71 P.S. §§ 581-1 through 581-12 (Aging). These defendants have filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the Eleventh Amendment[6] provides them immunity, and thus bars federal jurisdiction. See Blanciak v. Allegheny Ludlum Con,., 77 F.3d 690, 694 n 2 (3d

[6] The Eleventh Amendment states; "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Cir.1996) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89,98-100(1984) (Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction)).

It is well-established that, absent consent by the State, the Eleventh Amendment bars suits in federal court by private parties for money damages against states, state agencies and state officials in their official capacities. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261(1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54(1996); Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, 506 U.S. 139(1993); Kentucky v. Graham. 473 U.S. 159, 169(1985) (state officials sued in their official capacities are immunized from federal suit); Melo v. Hafer, 912 F.2d 628, 642 (3d Cir. 1990). The Amendment's bar extends to suits, as here, against departments or agencies of the state having no existence apart from the state. Laskaris v. Thornburgh, 661 F. 2d 23,25 (3d Cir. 1981)(citing Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 280 (1977)).

The Eleventh Amendment also applies where the plaintiff seeks equitable relief. Seminole Tribe of Florida, 517 U.S. at 58; Cory v. White, 457 U.S. 85,90-91(1982); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (Eleventh Amendment bars suit for

injunctive relief against State and its agencies absent State's consent). A state may consent to be sued in federal court, but the waiver must "unequivocally expressed" Pennhurst, 465 U.S. at 99. Pennsylvania has expressly withheld consent. 42 Pa.C.S. §8521(b); 1 Pa C.S. § 2310. See Laskaris, 661 F. 2d at 25.

Neither supplemental jurisdiction nor any other basis of jurisdiction overrides the Eleventh Amendment. Pennhurst, 465 U.S. at 121. Furthermore, Section 1983 does not override the Amendment. Quern v. Jordan, 440 U.S. 332,341-42(1979). Accordingly, I will dismiss Counts 1B, 1C, 1D, and lE in their entirety.

C. Untimeliness of Federal Claims

I also note that if these federal claims were properly before me, they would still fail as untimely. Although Rule 12(b) does not explicitly permit the assertion of a statute of limitations defense by a motion to dismiss, the so-called "Third Circuit Rule" allows a defendant to assert a limitations defense in a Rule 12 (b)(6) motion "if

the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" Zankel v. Temple University, 245 Fed. Appx. 196, 198 (3d Cm 2007) (citing Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002)). Because these federal statutes do not set forth a specific statute of limitations, the claims are subject to Pennsylvania's two-year statute of limitations. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 124 (2005) (where a plaintiff relies upon federal statutes in asserting a claim, and those statutes do not contain a specific provision regarding the time within which an action may be brought, federal courts apply the statute of limitations governing suits for personal injury in which the action arises); Wilson v. Garcia, 471 U.S. 265, 275 (1985); see also Lake v. Arnold, 232 F.3d 360,368 (3d Cir. 2000) (actions arising under Sections 1983 and 1985 are subject to the statute of limitations prescribed for personal-injury actions in the state in which the relevant events occurred). Pennsylvania's personal injury statute of limitations is two years. Vojtasek v. Diocese of Allentown, 916 A.2d 637, 640 (Pa. Super. 2006); 42 Pa.C.S.A. § 5524(2). The death of Marjorie Schneller is a discreet and identifiable event, and the statute of limitations on any claims arising from her death or any of the alleged events that

precipitated her death, began to arise on March 31, 2002. With the filing of the motion to proceed in forma pauperis, this action was commenced on April 10,2006, over four years after the death, and is thus untimely. Accordingly, Mr. Schneller's federal claims would he time-barred if they were properly before me.

D. State Law Claims

Mr. Schneller claims that the court has supplemental jurisdiction over his remaining state law claims pursuant to 28 U.S.C. § 1367(a), which provides:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in like action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The state law claims in this amended complaint substantially predominate over the federal claims. See 28 U.S.C. § 1367(c)(2). The federal claims in the amended complaint will be dismissed. 28 U.S.C. § 1367(c)(3). Accordingly, I decline to exercise supplemental jurisdiction over the state law claims in this case.

I note, however, that if the state law claims were properly before me, they would still be dismissed as untimely. The plaintiff and eleven of the thirteen defendants are residents of Pennsylvania, and all relevant events in this case arose in Pennsylvania. It is well established that a federal court shall apply Pennsylvania substantive law and federal procedural rules to the resolution of state law claims. See Erie Railroad Comnany v. Tomkins, 304 U.S. 64 (1938)). Accordingly, Pennsylvania law governs the disposition of the plaintiffs state law claims. In Pennsylvania, the applicable two-year statute of limitations for tort claims provides that: The following actions and proceedings must be commenced within two years:

(1)An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
(2)An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3)An action for taking, detaining or injuring personal property, including actions for specific recovery thereof . . .
(7)Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

Title 42 Pa. C.S.A. § 5524. Thus, under § 5524(2), because the case was filed over four years after Mrs. Schneller's death, the plaintiffs state law tort claims arising from her death or the care she received in the months preceding her death would also be time--barred.

Likewise, all contract claims in this amended complaint would also be untimely because under Pennsylvania law, an action for breach of contract is subject to a four-year statute of limitations. 42 Pa.C.S.A. § 5525. Mrs. Schneller died on March 31,2002, and the case was filed over four years later. Thus, the plaintiffs state law contract claims arising from the death of his mother or the care she received would also be time-barred.

In conclusion, while the plaintiff attempts to bring federal claims in combination with his predominant state law claims, the federal claims

will be dismissed for the reasons set forth in this memorandum. Finally, I decline to exercise supplemental jurisdiction over the state law claims, all of which are untimely.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES D. SCHNELLER, et al., CIVIL ACTION

Plaintiffs

v. NO. 06-1504

FOX SUBACUTE
CLARA BURKE, et al.,
Defendants

ORDER

AND NOW , this 25th day of June, 2009, upon consideration of the defendants' motions to dismiss (Documents #35, 38, 41, 55), the plaintiffs response thereto (Document #72), and after a status hearing with all parties present, it is hereby ORDERED that the motions to dismiss are GRANTED in their entirety.

IT IS FURTHER ORDERED that all remaining motions in this case are DENIED as moot. The Clerk of Court is directed to mark this action CLOSED for all purposes.

BY THE COURT:

_____/s/_____

LAWRENCE F. STENGEL